

STATE OF MICHIGAN  
COURT OF APPEALS

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In the Matter of ALEJANDRO/EDWARDS-  
GAFFORD/BECKER/MESA-RODRIGUEZ,  
Minors.

UNPUBLISHED

May 22, 2014

Nos. 317740; 318250  
Wayne Circuit Court  
Family Division  
LC No. 12-510790-NA

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Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent and would reverse the trial court's exercise of jurisdiction as to three of respondent-mother's four children as clearly erroneous.<sup>1</sup> In addition, while I do not conclude that the trial court's exercise of jurisdiction over JB, the youngest child, was clear error, the court erred by removing JB and the other children from the home, while denying respondent-mother unsupervised visitation, at the preliminary hearing<sup>2</sup> and abused its discretion by continuing the removal and lack of unsupervised visitation after taking jurisdiction.<sup>3</sup>

The petition was brought on December 3, 2012, when the DHS was informed that respondent-mother was not giving her son, JB, the anti-seizure medication recommended by one of his pediatric neurologists. At the initial hearing, the DHS offered no evidence sufficient to justify removal of any of the three other children on the basis of abuse, neglect, or any other statutory grounds.<sup>4</sup> Nevertheless, the court authorized the petition as to all four children and

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<sup>1</sup> "We review the trial court's decision to exercise jurisdiction [over children in child protective proceedings] for clear error in light of the court's findings of fact." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004).

<sup>2</sup> The statutory requirements for removing a child from his parent's care is provided by MCL 712A.13a(9) and MCR 3.963(B). We review de novo issues implicating statutory requirements and court rules. See *Reed v Yackell*, 473 Mich 520, 528-529; 703 NW2d 1 (2005).

<sup>3</sup> A trial court's decisions regarding parenting time after an adjudication are "left to the sound discretion of the trial court[.]" *In re Lester*, 303 Mich App 485, 490; \_\_\_ NW2d \_\_\_ (2013).

<sup>4</sup> "To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists." *BZ*, 264 Mich App at 295.

placed them in foster care. The court ordered only supervised visitation for their mother despite her counsel's objection:

Your honor, we're asking for unsupervised visitation at – it makes no sense to me why the other children are removed from the home. I don't think JB should be removed from the home and especially the other children. As stated the court said it would accept the testimony [that the psychologist] would say . . . that mom is a good mom, has good parenting skills. So we're asking that the child – that there be unsupervised visitation and that the children actually be returned to mom.

Review hearings occurred regularly for months and virtually every hearing was conducted by a different judge or magistrate.<sup>5</sup> At each hearing, respondent-mother requested that the children be returned to her or that she at least be permitted unsupervised visitation. At each hearing, the request was denied without sufficient explanation.

When the preliminary hearing continued on December 17, 2012, Miya Hall, the DHS worker assigned to respondent-mother's case, testified that the medical neglect allegation did not pertain to any children other than JB. She stated that the allegation was that respondent-mother failed to give JB medication as prescribed and failed to take him to required doctor's appointments. When asked, "how are [the other children] at risk?" she responded that, because respondent-mother was not meeting JB's medical needs, "she may not meet the medical needs of the other children." However, no such medical needs of the other children were identified. Hall also admitted to being unaware that respondent-mother had completed parenting classes and vocational training. The parties stipulated that the psychologist who treated the respondent-mother for 12 weeks earlier in 2012, at the request of the DHS, would testify that respondent "is a mom that's actively involved in her children's life [sic], providing a quality of life for her children" and "would contradict, in some regard or manner, what [Ms. Hall] had testified to."

At a hearing held January 2, 2013, the court continued to allow supervised visitation only and declined respondent-mother's counsel's request to have prompt access to JB's medical records, despite the fact that the DHS's allegation specifically concerned medical neglect. By the next hearing, held just over two months later on March 5, 2013, counsel for the DHS had still not provided JB's medical records to respondent-mother or her attorney. The court noted that respondent's drug screens were negative, but again refused to allow unsupervised visitation of any of the children.

The bench trial on jurisdiction finally took place on June 4 and July 19, 2013, six months after the removal of all four children from respondent-mother. At trial, the DHS finally offered evidence of the allegations of medical neglect. The evidence did demonstrate that respondent ceased giving JB prescribed medication for his diagnosis of nighttime (during sleep) benign rolandic epilepsy against the order of a pediatric neurologist. However, the medical records also demonstrated that a different pediatric neurologist in the same clinic as the prescribing physician, as well as an emergency room physician at the same hospital, viewed the medication as a

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<sup>5</sup> It appears that at least five different judges or magistrates conducted hearings in this case.

treatment option, rather than a requirement, so long as the seizures only occurred during sleep. For example, the other pediatric neurologist authored a treatment note stating that resumption of medication need only be considered “if seizures occur in daytime.” The *only* evidence of neglect or abuse at the trial concerned JB’s medication.<sup>6</sup>

The majority concludes that the other three children were properly removed under the doctrine of “anticipatory neglect.” However, this cannot serve to remove children and deny visitation in the absence of evidence that neglect could actually be anticipated. If a second child required medication for a serious condition, I would agree that the court could find anticipatory neglect as to that child. However, that is not the case here.<sup>7</sup> Moreover, it is difficult to understand the basis to remove the children, including JB, from the home when the court could simply have ordered that respondent comply with physician orders to administer medication. Finally, no basis to deny unsupervised visitation was ever articulated, let alone demonstrated.

The majority justifies the trial court’s removal of the children and its refusal to allow unsupervised visitation on the grounds that, at the time of an August 2013 dispositional hearing, respondent was residing at a “substance abuse rehabilitation facility.” However, there is no evidence that she had been abusing drugs at any time since the children’s removal. The only evidence presented was that respondent’s residence, as of that hearing, provided regular on-site drug testing in which respondent was participating, pursuant to the court’s earlier orders.<sup>8</sup> This was certainly not the basis for the court’s exercise of jurisdiction over the children and the record does not suggest that respondent was living in that facility at the time of the jurisdictional hearings.

This is essentially a case where four children were removed from their mother because she did not give one of the children anti-seizure medication, even when the evidence of the need for the medication was mixed. The mother was, and apparently still is, denied unsupervised visitation. I would reverse the order of jurisdiction as to all the children other than JB and, as to JB, remand for the court to impose conditions necessary to assure that respondent-mother do complies with necessary medication orders.

Accordingly, I respectfully dissent.

/s/ Douglas B. Shapiro

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<sup>6</sup> “Jurisdiction must be established by a preponderance of the evidence.” *BZ*, 264 Mich App at 295.

<sup>7</sup> Compare *In re Dittrick Infant*, 80 Mich App 219, 221; 263 NW2d 37 (1977) (jurisdiction over newborn was proper where parental rights to older child had been terminated due to “continuing physical and sexual abuse”).

<sup>8</sup> The court-appointed psychologist’s report of August 19, 2013 does not conclude that respondent was using drugs at that time.